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FROM: Hattie M. Ulan, Associate General Counsel

SUBJ: Nonstandard Bylaw Amendments -[]

[] Your December 18, 1990, Memo)

DATE: January 25, 1991

You have asked that we comment on two proposed nonstandard bylaw amendments submitted by [] (FCU). We recommend that the proposed amendments not be approved.

Voting on FCU Expenditures in Excess of \$100,000

The FCU has a nine director board, therefore a quorum consists of five directors. According to the Standard FCU Bylaws, a quorum is needed to transact FCU business. Since three directors constitute a majority of a quorum, three directors can presently approve expenditures over \$100,000 if only five directors attend a board meeting. The FCU believes that the votes of more than three directors should be required to obligate the FCU for such expenditures.

The proposed amendment to Article VII adds a Section 9 requiring every board member to vote or abstain on all FCU expenditures in excess of \$100,000. The amendment requires notification of all board members in advance of any meeting requiring action on expenditures in excess of \$100,000. If any directors fail to attend this meeting, a second meeting is scheduled to act on the expenditure. If a director misses two successive meetings, he is contacted by telephone or other electronic means and required to vote. No expenditure over \$100,000 is approved until every director votes or abstains.

Article VII, Section 6 of the Standard FCU Bylaws states that "[a] majority of the number of directors (inclusive of any vacancies) shall constitute a quorum for the transaction of business at any meeting thereof." We do not interpret this section to prohibit FCUs from adopting other bylaws to require super majorities for certain transactions or requiring all directors to vote on a specific action. In addition, a standard bylaw amendment to Article VII, Section 4 of the standard FCU Bylaws permits conference telephone call meetings to replace regular meetings of the board of directors. Although there is no general prohibition in requiring all directors to vote or abstain on a particular issue pursuant to a legally adopted bylaw, there may be a legal problem with requiring a director to vote outside of a legal meeting. (See 18B Am Jur 2d Corporations S1446, attached). The FCU can alleviate this problem by adopting the standard bylaw amendment concerning telephone conference call meetings and requiring any vote obtained through a

telephonic communication to be part of a regular meeting. The proposed amendment should be modified to incorporate this change.

In addition to the above cited legal problem, there are numerous operational problems with this proposed nonstandard bylaw: 1) What happens if a director is incapacitated and can not vote? (Is the expenditure held in abeyance indefinitely?); 2) What happens if a director is at the first meeting where the expenditure is discussed but no vote is taken, a second meeting is scheduled, the expenditure is voted on and the director fails to attend? According to the bylaw, the telephonic contact only occurs after missing two successive meetings; 3) How will adoption of the expenditure be recorded after the telephone vote? These ambiguities and operational difficulties need to be addressed by the FCU.

There is an alternative solution to accomplish the FCU's goal of preventing a minority of directors from binding the FCU. The FCU can adopt a nonstandard bylaw amendment requiring a majority of the total number of directors, not a majority of directors constituting a quorum, to approve FCU expenditures in excess of \$100,000. The wording of such an amendment would be similar to the first sentence of Article XXI, Section 1 of the Standard FCU Bylaws.

Indemnification

The second proposed amendment adds a Section 8 to Article XIX of the FCU's bylaws, providing for indemnification of the FCU's officials and employees. As compared to the standard bylaw amendment, this proposed amendment, among other things, increases the number of indemnified actions of an officer, as well as providing a more liberal policy regarding the advancement of expenses. We recommend that the proposed amendment not be approved.

The standard bylaw amendment was developed so that NCUA would not be required to engage in the time-consuming process of reviewing every proposed indemnification bylaw to ensure compliance with state law or the Model Business Corporation Act. Retreating from that position in the instant case might open the door to consideration of numerous similar nonstandard bylaws in the future. We believe that the standard bylaw adequately addresses the FCU's concerns by providing that officials and employees may be indemnified only "to the extent authorized by the law of the state of (Maryland]." We recommend that any state law particularities be adopted by board resolution. They need not be part of the bylaws.